

The Honorable James L. Robart

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOHNNY B. DELASHAW, JR.,

Plaintiff,

v.

SEATTLE TIMES COMPANY, and  
CHARLES COBBS,

Defendants.

CASE NO. 2:18-cv-00537-JLR

SEATTLE TIMES COMPANY'S  
MOTION TO COMPEL

**NOTED ON MOTION CALENDAR:  
January 11, 2019**

(REDACTED)

SEATTLE TIMES COMPANY'S MOTION TO COMPEL  
CASE NO. 2:18-cv-00537-JLR

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## I. INTRODUCTION & RELIEF REQUESTED

Defendant Seattle Times Company (“The Seattle Times”) respectfully moves to compel production of 34 emails withheld by Plaintiff Dr. Johnny Delashaw on the basis of the attorney-client privilege and/or work product doctrine.

None of the emails was drafted by a lawyer, though lawyers were regularly copied. Every email was authored by, or sent to, a third party not involved in this litigation. Dr. Rod Oskouian (one of Dr. Delashaw’s former colleagues at Swedish) was involved in 29 of the email exchanges. Dave Sabey (a wealthy real estate developer who was one of Dr. Delashaw’s earliest supporters and a driving force behind Dr. Delashaw’s move to the Swedish Neuroscience Institute (“SNI”) in 2013) was involved in 18.

Dr. Delashaw claims that the third parties’ participation in the email exchanges does not waive the asserted protections because he, Dr. Oskouian and Mr. Sabey shared a “common interest.” The group’s stated goal was to [REDACTED]

[REDACTED] However, the common interest exception does not apply unless each member of the group has a *common, identical, legal interest*. The participants in the withheld emails have never been involved in the same lawsuit and had no common claims or liabilities. A *shared business or commercial interest* in pursuing a common objective is not enough.

Dr. Delashaw should be ordered to produce the 34 withheld emails and their attachments. As detailed below, Dr. Delashaw’s privilege log also suffers from other concerns that warrant production or, at a minimum, *in camera* inspection.

## II. FACTUAL BACKGROUND

### A. The Seattle Times Articles

On February 10, 2017, The Seattle Times published two lengthy investigative articles, together entitled “Quantity of Care,” about the business and medical practices at SNI where

Dr. Delashaw was chairman of neurosurgery (the “Articles”).<sup>1</sup> The first Article (“A Lost Voice”) concerns the catastrophic asphyxiation death of Dr. Delashaw’s young patient after she emerged from surgery and despite hours of documented concerns about her post-surgery breathing difficulties. The second Article (“High Volume, Big Dollars, Rising Tension”) concerns the high-volume surgical enterprise at SNI headed by Dr. Delashaw.

**B. The Shared Objectives of Dr. Delashaw, Dr. Oskouian, and Mr. Sabey**

Counsel for Dr. Delashaw has represented that, in the late summer of 2017, Dr. Delashaw, Dr. Oskouian, and Mr. Sabey agreed to work together to determine their strategies in response to The Seattle Times articles, months later committing their agreement to writing.<sup>2</sup> On December 18, 2018, Dr. Delashaw produced the [REDACTED] (the “Common Interest Agreement”).<sup>3</sup> While it is undated, counsel for Dr. Delashaw has represented that Dr. Delashaw and Dr. Oskouian signed it in November 2017, and that it was signed on Mr. Sabey’s behalf by counsel in December 2017.<sup>4</sup>

The Common Interest Agreement states that [REDACTED]

[REDACTED].<sup>5</sup> Counsel for Dr. Delashaw also stated that HLFT has represented Mr. Sabey and the Sabey Corporation for years.<sup>6</sup> And, while HLFT has never represented Dr. Oskouian (who was represented by another law firm), Dr. Delashaw’s counsel has explained that “[s]tarting in August 2017, Dr. Oskouian sought our legal advice and reasonably believed our communications to be privileged and confidential.”<sup>7</sup>

<sup>1</sup> The Quantity of Care articles, referenced and discussed in the Complaint, can be found here: <https://projects.seattletimes.com/2017/quantity-of-care/talia/> (last visited December 20, 2018); <https://projects.seattletimes.com/2017/quantity-of-care/hospital/> (last visited December 20, 2018).

<sup>2</sup> Declaration of Jessica Goldman in Support of Seattle Times Company’s Motion to Compel (“Goldman Decl.”), Ex. 1.

<sup>3</sup> *Id.*, Ex. 3.

<sup>4</sup> *Id.*, Ex. 4.

<sup>5</sup> *Id.*, Ex. 3.

<sup>6</sup> *Id.*, Ex. 1.

<sup>7</sup> *Id.*, Exs. 1-5.

1 The Common Interest Agreement describes the “common interest” shared by Mr. Sabey,  
 2 Dr. Delashaw, and Dr. Oskouian, stating [REDACTED]

3 [REDACTED]  
 4 [REDACTED]<sup>8</sup>  
 5 On December 30, 2017, Mr. Sabey shared his thoughts with the group (in an email  
 6 obtained through a public records request to the Department of Health), lamenting the public  
 7 perception created by another “false story” and the need to take affirmative steps to “change the  
 8 story”:

9 What this article points out to me is there is a sophisticated group of “someone’s”  
 10 methodically building a false story that is altering public perception with the appeared  
 11 goal of taking out Hochman and at the same time muting Prov/Swedish/SNI’s impact  
 12 on PNW health care. The question is—who would benefit from that outcome?  
 13 Times, UW Medicine, legacy Swedish doc/people that opposed the merger, Prof  
 14 doc/people that opposed the merger and don’t like Hochman or worst, maybe all of  
 15 them are variously working together because they despise the change that they’re  
 16 dealing with. That’s the problem. The next question is what to do? We need to  
 17 change the story. We can’t keep reacting to their messaging. We need to front run  
 18 the messaging and get out in front of this story. Maybe it’s the “smoking gun” email  
 19 getting public that changes the messaging?<sup>9</sup>

20 This was the sentiment shared among the “common interest” group at the time of the  
 21 34 emails at issue, all drafted between September 5, 2017 and January 11, 2018.

### 22 C. Dr. Delashaw’s Claims Against The Seattle Times

23 On April 11, 2018, Dr. Delashaw filed his Complaint in this matter and filed his Amended  
 24 Complaint on June 25. He asserted claims against The Seattle Times for defamation, tortious  
 25 interference, and under Washington’s Consumer Protection Act (“CPA”), RCW 19.86 et seq.

26 By Order dated August 23, 2018, the Court dismissed Dr. Delashaw’s CPA claim, limited  
 his defamation claim to the Quantity of Care articles and five allegedly defamatory subjects, and

<sup>8</sup> *Id.*, Ex. 2.

<sup>9</sup> *Id.*, Ex. 6.

1 allowed his tortious interference claim to proceed.<sup>10</sup> The parties have since focused on discovery.

## 2 **D. The Current Discovery Dispute**

3 On November 16, 2018, Dr. Delashaw provided a privilege log relating to his November 2  
4 document production.<sup>11</sup> The privilege log included 34 emails exchanged among Dr. Delashaw,  
5 Dr. Oskouian, Mr. Sabey, Bob Gust and, on occasion, lawyers from HLFT or from another law  
6 firm representing Dr. Delashaw in a licensing proceeding before the Department of Health. Each  
7 was identified as protected by the attorney-client privilege, work product doctrine, or both.<sup>12</sup>

8 Discovery conferences were held on November 19 and November 27.<sup>13</sup> Counsel for The  
9 Seattle Times asserted that the participation of third-parties in the communications waived any  
10 potential protections.<sup>14</sup> Counsel for Dr. Delashaw claimed there was no waiver in light of the  
11 common interest exception.<sup>15</sup> By email dated December 11, counsel for The Seattle Times  
12 specifically identified the 34 emails at issue and provided a detailed legal analysis explaining why  
13 Dr. Delashaw's reliance on the common interest exception was misplaced.<sup>16</sup> On December 14, Dr.  
14 Delashaw provided a revised privilege log, including material changes to the prior explanations.<sup>17</sup>

## 15 **E. Privilege Log Extract – the 34 Emails at Issue**

16 Attached hereto as an Appendix is an extract from Dr. Delashaw's December 14 revised  
17 privilege log, which includes only the 34 emails at issue. The emails have been arranged in  
18 chronological order and the basis for withholding (attorney-client privilege and/or work product  
19 doctrine) is now reflected in two columns, not one. No other changes have been made.

20 The Appendix lists 34 emails exchanged among Dr. Delashaw, Dr. Oskouian, Mr. Sabey,

21  
22 <sup>10</sup> Order on Motions to Dismiss, ECF No. 39 at 16-17 (limiting Dr. Delashaw to statements concerning the  
23 following subject matter: "concurrent surgeries, the compensation structure at SNI, the volume of surgeries, patient  
24 endangerment, and Dr. Delashaw's absence from critical parts of surgical procedures.")

<sup>11</sup> Goldman Decl., Ex. 7.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, ¶ 9 and Ex. 1.

<sup>14</sup> *Id.*, Ex. 2.

<sup>15</sup> *Id.*, Ex. 1.

<sup>16</sup> *Id.*, Ex. 2.

<sup>17</sup> *Id.*, Ex. 8.

1 and/or Mr. Gust<sup>18</sup> from September 5, 2017 to January 11, 2018. None was authored by a lawyer.  
 2 Twenty were authored by Dr. Oskouian. The rest were authored by Dr. Delashaw, Mr. Sabey, or  
 3 Mr. Gust. While lawyers were copied on all but three emails, there is no evidence that any lawyer  
 4 weighed in on any of the exchanges, making it difficult to conclude that legal advice was being  
 5 requested or provided – or that the exchanges qualify for work product protection.

6 A comparison with the original privilege log reveals changes to each of the 34 entries:

- 7 • Attorney-client privilege claims were dropped for 7 of Dr. Oskouian's emails.
- 8 • 17 document descriptions were changed (changes shown in **bold**):
  - 9 ○ Original Log – “Email [and attachment/s] containing client confidential  
 10 information reflecting legal advice **and legal advice regarding licensing matter.**”
  - 11 ○ Revised Log – “Email [and attachment/s] containing client confidential  
 12 information reflecting legal advice **and/or legal advice regarding ongoing issues**  
 13 **pertaining to Cobbs et al. conspiracy and Seattle Times articles and related**  
 14 **government investigations.**”
  - 15 • 15 document descriptions were changed (changes shown in **bold**):
    - 16 ○ Original Log - “Email [and attachment/s] containing client confidential  
 17 information reflecting legal advice **and legal advice regarding instant matter.**”
    - 18 ○ Revised Log – “Email [and attachment/s] containing client confidential  
 19 information reflecting legal advice **and/or legal advice regarding ongoing issues**  
 20 **pertaining to Cobbs et al. conspiracy and Seattle Times articles.**”
    - 21 • 2 document descriptions originally referring to the “MQAC matter”<sup>19</sup> were revised to  
 22 reflect the same revised language above (one each).

### 23 III. ARGUMENT

24 Dr. Delashaw has not shown that any of the 34 emails at issue, or their attachments, are  
 25 protected by the attorney-client privilege or work product doctrine. Each email exchange was  
 26 between Dr. Delashaw and one or more third parties. Although lawyers also were copied on

<sup>18</sup> Counsel for Dr. Delashaw has represented that Mr. Gust is a non-testifying litigation consultant. *Id.*, Ex. 1.

<sup>19</sup> As stated in the Amended Complaint, in May 2017, the Washington State Medical Quality Assurance Commission (MQAC) suspended Dr. Delashaw's license to practice medicine. Amended Complaint, Dkt. #20, ¶ 53.

1 nearly all of the emails, there is no indication that any lawyer participated in the exchanges. There  
 2 is no basis to conclude that an HLFT client was seeking, or receiving, legal advice. And there is  
 3 no basis to conclude that a non-lawyer's views on alleged inaccurate reporting, or perspectives on  
 4 potential legal matters, qualifies for protection. The group's shared business interest in taking  
 5 some action to correct perceived inaccuracies and re-shape public perception are insufficient, as a  
 6 matter of law, to invoke the common interest exception. The emails, and attachments, should be  
 7 produced.

8 **A. The Emails Are Not Privileged.**

9 The document descriptions in Dr. Delashaw's privilege log fail to provide information  
 10 sufficient to conclude the emails should be protected. The log uses the *same* description  
 11 regardless of whether Dr. Delashaw is invoking *only* the attorney-client privilege (Appendix, Doc.  
 12 Nos. 6, 15), *only* the work product doctrine (Appendix, Doc. Nos. 25 – 30, 33), or *both* (all other  
 13 emails). Nothing in the description hints at any substantive difference in content. Likewise, each  
 14 document is described as "containing client confidential information reflecting legal advice  
 15 **and/or** legal advice regarding...." Dr. Delashaw's use of "**and/or**" requires The Seattle Times to  
 16 guess whether each email contains the first category of information, the second, or both.

17 While the substantive problems with the revised privilege log, by themselves, warrant *in*  
 18 *camera* review, what is known about the participants in the communications is sufficient to  
 19 conclude that the emails are being withheld improperly and must be produced.

20 **1. The Attorney-Client Privilege Does Not Apply.**

21 Dr. Delashaw asserts that 27 of the 34 emails at issue are protected by the attorney-client  
 22 privilege. The privilege is designed to protect communications between attorney and client, in  
 23 which legal advice is being sought or received. *Aecon Bldgs., Inc. v. Zurich N. Am.*, 253 F.R.D.  
 24 655, 660 (W.D. Wash. 2008) ("essence of the attorney/client relationship is whether the attorney's  
 25 advice or assistance is sought and received on legal matters") (citing *Bohn v. Cody*, 119 Wash.2d  
 26 357, 363, 832 P.2d 71 (1992)). Copying an attorney on a communication is, by itself, insufficient

1 to merit protection. The party withholding documents has the burden of proving the attorney-  
 2 client privilege. *Dietz v. Doe*, 131 Wash. 2d 835, 851, 935 P.2d 611, 619 (1997); *U.S. v. Ruehle*,  
 3 583 F.3d 600, 607 (9th Cir. 2009). Dr. Delashaw cannot meet this burden.

4 Dr. Delashaw's privilege log describes each email as "containing client confidential  
 5 information reflecting legal advice and/or legal advice...." Missing is any specific identification  
 6 of the attorney who provided the advice or the client who received the advice. And although the  
 7 emails span the period from September 5, 2017 to January 11, 2018, by the time the Common  
 8 Interest Agreement was signed in November and December 2017, [REDACTED]

9 [REDACTED].<sup>20</sup> Mr. Sabey authored only *one* of the ostensibly privileged emails. Appendix (Doc. No.  
 10 13).

11 Dr. Oskouian authored 13 emails asserted to be attorney-client privileged. Appendix (Doc.  
 12 Nos. 1 – 6, 11, 12, 16, 17, 19, 21, 23). While counsel for Dr. Delashaw reported that Dr. Oskouian  
 13 was represented by attorney Bob Mahler<sup>21</sup> and that, "[s]tarting in August 2017, Dr. Oskouian  
 14 sought our legal advice," [REDACTED]<sup>22</sup> Nothing in the privilege log  
 15 indicates he was seeking legal advice – each email is described as possibly "containing" legal  
 16 advice, a description inconsistent with an effort to *obtain* legal advice. Even if *Dr. Oskouian*  
 17 believed his emails were privileged because HLFT lawyers were copied on them, *the lawyers*  
 18 *knew that was not the case* and they could not provide Dr. Oskouian with privileged legal advice.  
 19 Dr. Oskouian's status as a third-party, *non-client*, of HLFT (who did not involve his own lawyer)  
 20 belies any suggestion that he was regularly seeking legal advice from HLFT over the course of  
 21 *four* months. There is no basis to conclude that Dr. Oskouian's 13 emails are privileged.

22 For similar reasons, the 12 emails Dr. Delashaw authored are not privileged. Appendix  
 23 (Doc. Nos. 7 – 10, 14, 15, 18, 20, 22). There is no indication he was an HLFT client at the time.  
 24 To the contrary, the Common Interest Agreement [REDACTED]

25 <sup>20</sup> Goldman Decl., Ex. 3.

26 <sup>21</sup> *Id.*, Ex. 1.

<sup>22</sup> *Id.*, Ex. 5.

1 [REDACTED]<sup>23</sup> As noted above, the descriptions do not reflect an effort to *obtain* legal advice.

2 The sole remaining email claimed to be protected by the attorney-client privilege was sent  
3 from Mr. Gust to Dr. Delashaw. Appendix (Doc. No. 24). No attorneys were involved in the  
4 communication, or even copied. Counsel for Dr. Delashaw has taken the position that Mr. Gust is  
5 a consulting, non-testifying witness, but has not supplied the date he was retained, despite  
6 request.<sup>24</sup> Mr. Gust is a percipient witness who was involved in email exchanges with this same  
7 group dating back to 2013, when Dr. Delashaw first arrived at SNI.<sup>25</sup> The email is not privileged.

8 Only one email was authored by an HLFT client, Mr. Sabey. No other participant in the  
9 exchanges appears to have been represented by HLFT at the time. There is no indication that Mr.  
10 Sabey (or any other author) was either seeking or receiving legal advice. Instead, the description  
11 for each email at issue could be interpreted to imply that some *pre-existing* legal advice was being  
12 discussed (“Email containing client confidential information reflecting legal advice and/or legal  
13 advice”). If *that* is Dr. Delashaw’s position, it is not possible to discern from the log which client  
14 and which attorney might have been involved in the underlying communication.

15 Disclosure of an otherwise privileged communication to third parties waives the attorney-  
16 client privilege. *Kittitas Cty. v. Allphin*, 190 Wash. 2d 691, 710, 416 P.3d 1232, 1242 (2018); *In*  
17 *re Pac. Pictures Corp.*, 679 F.3d 1121, 1126–27 (9th Cir. 2012). These emails are not protected.

## 18 2. The Work Product Doctrine Does Not Apply

19 Dr. Delashaw also invokes the work product doctrine to withhold 32 of the 34 emails.<sup>26</sup>

20 The work product doctrine, first articulated in *Hickman v. Taylor*, 329 U.S. 495, 511  
21 (1947), and codified in Federal Rule of Civil Procedure 26(b)(3), is “a qualified immunity  
22 protecting from discovery documents and tangible things prepared by a party or his representative  
23 in anticipation of litigation.” *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1494 (9th Cir.

24 <sup>23</sup> Goldman Decl., Ex. 3.

25 <sup>24</sup> *Id.*, Ex. 3.

26 <sup>25</sup> *Id.*, Ex. 12.

<sup>26</sup> Dr. Delashaw is not asserting work product for Appendix Doc. No. 6 or No. 15, or the attachment to No. 21.

1 1989). Work product protection seeks to “promote the adversary system by safeguarding the fruits  
 2 of an attorney’s trial preparations from the discovery attempts of the opponent.” *U.S. v. Am. Tel.*  
 3 *& Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). In order for an attorney to properly prepare a  
 4 client’s case, he or she must be able to “assemble information, sift what he considers to be the  
 5 relevant from irrelevant facts, prepare his legal theories and plan his strategy without undue and  
 6 needless interference.” *Hickman*, 329 U.S. at 511. In short, the work product doctrine protects the  
 7 integrity of the adversary system. *Am. Tel. & Tel. Co.*, 642 F.2d at 1299.

8 Under Fed. R. Civ. P. 26(3)(A), to qualify for work product protection, a document must  
 9 have been “prepared in anticipation of litigation or for trial by or for another party or its  
 10 representative.” *In re Cal. Pub. Utils. Comm’n*, 892 F.2d 778, 780–81 (9th Cir. 1989) (to qualify  
 11 for protection, documents must have two characteristics: “(1) they must be prepared in anticipation  
 12 of litigation or for trial, and (2) they must be prepared by or for another party [to the litigation] or  
 13 by or for that other party’s representative”). Dr. Delashaw cannot meet either part of the test.

14 First, the 32 emails were not “prepared in anticipation of litigation.” Dr. Delashaw does  
 15 not appear to have been an HLFT client at the time they were created. This lawsuit was not filed  
 16 until several months later. The privilege log describes the emails as containing “legal advice  
 17 regarding ongoing issues....” But if that supposed “legal advice” was not provided by an attorney  
 18 to a client (*i.e.*, if it was not a communication protected by the attorney-client privilege) it could  
 19 not have been “prepared in anticipation of litigation.”

20 Second, at most, only the 11 emails authored by Dr. Delashaw could have been “prepared  
 21 by or for” a party to this litigation. The remaining 21 emails (19 of which were authored by Dr.  
 22 Oskouian) fail the test’s second part because the work product doctrine does not apply to third  
 23 party documents. *See, e.g., Weiss v. Nat’l Westminster Bank, PLC*, 242 F.R.D. 33, 67 (E.D. N.Y.  
 24 2007) (“parties cannot avoid disclosure based upon the simple fact that counsel obtained certain  
 25 documents from third parties.”); *Bohannon v. Honda Motor Co. Ltd.*, 127 F.R.D. 536, 539 (D.  
 26 Kan. 1989) (“work product status does not apply to documents ... received from a third party.”).

1 The thorough and recent analysis in *Beltran v. InterExchange, Inc.*, No. 14-CV-03074-  
 2 CMA-CBS, 2018 WL 839927, at \*6 (D. Colo. Feb. 12, 2018), is instructive on this point. The  
 3 case involved a subpoena directed to the Alliance for International Exchange (the “Alliance”), a  
 4 trade association whose interests were directly aligned with defendants’. The Alliance sought to  
 5 withhold notes of communications with defendants about the lawsuit, based on claims of work  
 6 product, attorney-client privilege, and the common interest exception. While a magistrate judge  
 7 initially denied plaintiffs’ motion to compel, the District Court reversed that ruling:

8 Defendants fail to meet their burden to show that the documents were prepared  
 9 “by or for [a] party or its representative.” ...the documents were created by the  
 10 Alliance’s non-legal staff... The Alliance and its staff members are not party to  
 this action. Nor is the Alliance a representative of Defendants in this action.

11 ...

12 The Magistrate Judge’s determination that the information exchanged “was quite  
 13 obviously ‘based on attorney advice’” and “uniformly involved the mental  
 14 impressions, conclusions, opinions, or legal theories of the speaking Defendant  
 representative, often directly attributable to the party’s received legal advice” is  
 insufficient to satisfy Rule 26(b)(3)’s requirement that a document must be  
 prepared “by or for [a] party or its representative.”

15 *Id.* at \* 6-7. Accordingly, the court found that “[t]he work product privilege does not protect the  
 16 Alliance’s notes as a matter of law.” *Id.* at \* 6.

17 Here, the 21 emails authored by third parties similarly do not qualify as work product,  
 18 regardless of whether or not they relate to legal advice or reflect their personal perspective on the  
 19 legal issues that might arise in the lawsuit Dr. Delashaw ultimately filed several months later.

20 **B. Any Protections Were Waived Through Disclosure to Third Parties; the Common  
 Interest Exception Does Not Apply Here**

21 The common interest exception does not provide an independent basis for withholding  
 22 documents not otherwise protected by the attorney-client privilege or work product doctrine. The  
 23 doctrine is not itself a *privilege*; it is a narrow *exception* to the rule that disclosure of protected  
 24 material to third parties waives the attorney-client or work product protections. *Nidec Corp. v.*  
 25 *Victor Co. of Japan*, 249 F.R.D. 575, 578 (N. D. Cal. 2007). The common interest exception is  
 26

1 inapplicable here for at least three reasons.

2 First, for the exception to apply, the participants in the communication must share a  
3 common interest in joint litigation or anticipated joint litigation. They must have a common legal,  
4 as opposed to business, interest and the communication must be designed to further *that* legal  
5 effort. *Regents of the Univ. of Cal. v. Affymetrix, Inc.*, 326 F.R.D. 275, 279 (S.D. Cal. 2018);  
6 *Sanders v. State*, 169 Wn.2d 827, 853, 240 P.3d 120 (2010) (common interest exception protects  
7 communications between multiple parties “pertaining to their common claim”); *In re: Premera*  
8 *Blue Cross Customer Data Secty. Breach Litig.*, 296 F. Supp. 3d 1230, 1247 (D. Or. 2017)  
9 (common interest applies to “parties within the *same* litigation”).

10 Therefore, though the Alliance and Defendants may share a common interest in  
11 retaining the current method of paying *au pairs* ... it is a common business or  
12 commercial interest. [An interest] in “retain[ing] the current method of stipends”  
... is not an identical legal interest; it is a business or commercial interest.

13 *Beltran*, 2018 WL 839927 at \* 9-10.

14 The shared interest of Mr. Sabey, Dr. Delashaw, and Dr. Oskouian to [REDACTED]  
15 [REDACTED] (as  
16 expressed in their Common Interest Agreement) or their shared interest in finding a way to change  
17 public perception and control the narrative (as expressed in Mr. Sabey’s December 2017 email<sup>27</sup>)  
18 reflects, at best, a common *business or commercial interest*, and not a qualifying *legal interest*.

19 Second, the communication itself must be designed to further that precise legal claim in  
20 joint litigation. *Nidex Corp.*, 249 F.R.D. at 579 (rejecting claim of common interest where the  
21 communication may “have been helpful to facilitate the potential commercial transaction” but “did  
22 not further a common legal strategy in connection with the instant litigation”). Where the parties  
23 are not part of the same litigation or entitled to assert the same claim, the common interest doctrine  
24 does not apply. This is true where the participants have similar legal theories or claims but they  
25 arise from different facts. *Premera Blue Cross*, 296 F. Supp. 3d at 1248; *Frontier Ref., Inc. v.*

26 <sup>27</sup> Goldman Decl., Ex. 6.

1 *Gorman-Rupp, Co., Inc.*, 136 F.3d 695, 705 (10<sup>th</sup> Cir. 1998) (“The key consideration is that the  
2 nature of the interest be identical, not similar”).

3 Here, the participants in the email exchanges do not have a common, identical, legal  
4 interest. Neither Mr. Sabey, his company, nor the Seattle Science Foundation, are mentioned in  
5 the February 2017 Quantity of Care articles. Mr. Sabey has no cause of action arising from the  
6 defamation claims in this lawsuit: “concurrent surgeries, the compensation structure at SNI, the  
7 volume of surgeries, patient endangerment, and Dr. Delashaw’s absence from critical parts of  
8 surgical procedures.” ECF No. 39 at 16.

9 Third, the common interest exception does not apply because the third-party participants in  
10 the exchanges were not all represented by counsel participating in the exchanges. The exception is  
11 designed to allow attorneys for different clients pursuing a common legal strategy to communicate  
12 with each other. *In re Pac. Pictures Corp.*, 679 F.3d at 1129. There must be an on-going and  
13 joint effort to set up a common litigation strategy for the common interest exception to apply. “A  
14 shared desire to see the same outcome in a legal matter is insufficient to bring a communication  
15 between two parties within this exception.” *Id.* Rather, the parties must make the communication  
16 in pursuit of a joint strategy in accordance with an agreement. *Id.* “The requirement that each  
17 party to a common interest arrangement have an attorney also comports with the intent behind the  
18 common interest privilege, to permit attorneys to develop a joint legal strategy; the development  
19 of legal strategy requires the participation of lawyers.” *Regents of the Univ. of Cal.*, 326 F.R.D. at  
20 281. As reflected in the Common Interest Agreement, at the time of the email exchanges and  
21 articulation of the alleged “common interest,” [REDACTED].

#### 22 IV. CONCLUSION

23 Dr. Delashaw should be ordered to produce the 34 emails, with their respective  
24 attachments, identified in the Appendix. To the degree there is any doubt that these documents  
25 must be disclosed, The Seattle Times requests that the Court conduct an *in camera* review.  
26

1 DATED this 21<sup>st</sup> day of December, 2018.

2 Respectfully submitted,

3 SUMMIT LAW GROUP PLLC

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 21<sup>st</sup> day of December, 2018.

s/ Denise Brandenstein  
Denise Brandenstein

# APPENDIX

	Doc Id	Date	Attorney-Client	Work-Product	Description	Author	From	To	CC
1	545313	9/5/2017 6:59 AM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles.		Rod Oskouian <rod.oskouian@gmail.com>	vickyc@harriganleyh.com; tylerf@harriganleyh.com; robertgust@mac.com; DaveS@sabey.com; harrigan@seanet.com; jrlayman@laymanlawfirm.com; Johnny Delashaw <jdelashawjr@gmail.com>	
2	544345	9/5/2017 7:08 AM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles.		Rod Oskouian <rod.oskouian@gmail.com>	vickyc@harriganleyh.com; tylerf@harriganleyh.com; robertgust@mac.com; Johnny Delashaw <jdelashawjr@gmail.com>; jrlayman@laymanlawfirm.com; DaveS@sabey.com; harrigan@seanet.com	
3	542995	11/16/2017 4:58 PM	X	X	Email and attachment containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Rod Oskouian <rod.oskouian@gmail.com>	Johnny Delashaw <jdelashawjr@gmail.com>	
	542996	11/16/2017 4:58 PM	X	X	attachment to doc ID 542995				
4	547461	11/18/2017 7:56 AM	X	X	Email and attachment containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles.		Rod Oskouian <rod.oskouian@me.com>	tylerf@harriganleyh.com; Robert Gust <robertgust@me.com>; Johnny Delashaw <jdelashawjr@gmail.com>; DaveS@sabey.com; harrigan@seanet.com	
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5	546882	11/18/2017 8:01 AM	X	X	Email and attachment containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Rod Oskouian <rod.oskouian@me.com>	tylerf@harriganleyh.com; Robert Gust <robertgust@me.com>; Johnny Delashaw <jdelashawjr@gmail.com>; DaveS@sabey.com; harrigan@seanet.com; Tyler Farmer <tylerf@harriganleyh.com>	
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6	547083	11/18/2017 8:04 AM	X		Email and attachment containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles.		Rod Oskouian <rod.oskouian@me.com>	tylerf@harriganleyh.com; Robert Gust <robertgust@me.com>; Johnny Delashaw <jdelashawjr@gmail.com>; DaveS@sabey.com; harrigan@seanet.com	
	547084	11/18/2017 8:04 AM	X		attachment to doc ID 547083				
7	547137	11/18/2017 1:02 PM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Johnny Delashaw <jdelashawjr@gmail.com>	Robert Gust <robertgust@me.com>; Rod J. Oskouian Jr. <rod.oskouian@gmail.com>; Dave Sabey <DaveS@sabey.com>; Arthur Harrigan <harrigan@seanet.com>; tylerf@harriganleyh.com; Tyler Farmer <tylerf@harriganleyh.com>	
8	546946	11/18/2017 1:03 PM	X	X	Email and attachment containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles.		Johnny Delashaw <jdelashawjr@gmail.com>	Robert Gust <robertgust@me.com>; Rod J. Oskouian Jr. <rod.oskouian@gmail.com>; Dave Sabey <DaveS@sabey.com>; Arthur Harrigan <harrigan@seanet.com>; tylerf@harriganleyh.com	
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9	547890	11/18/2017 1:22 PM	X	X	Email and attachment containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles.		Johnny Delashaw <jdelashawjr@gmail.com>	Arthur Harrigan <harrigan@seanet.com>; tylerf@harriganleyh.com; Robert Gust <robertgust@me.com>; Rod J. Oskouian Jr. <rod.oskouian@gmail.com>; Dave Sabey <DaveS@sabey.com>	
	547891	11/18/2017 1:22 PM	X	X	attachment to doc ID 547890				
10	547962	11/18/2017 3:21 PM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Johnny Delashaw <jdelashawjr@gmail.com>	tylerf@harriganleyh.com; Arthur Harrigan <harrigan@seanet.com>; Dave Sabey <DaveS@sabey.com>; Robert Gust <robertgust@me.com>; Rod J. Oskouian Jr. <rod.oskouian@gmail.com>; Tyler Farmer <tylerf@harriganleyh.com>	
11	552067	11/18/2017 3:49 PM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Rod Oskouian <rod.oskouian@me.com>	Johnny Delashaw <jdelashawjr@gmail.com>	Dave Sabey <DaveS@sabey.com>; Arthur Harrigan <harrigan@seanet.com>; tylerf@harriganleyh.com; Robert Gust <robertgust@me.com>
12	554791	11/18/2017 6:35 PM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Seattle Times articles and related government investigations.		Rod Oskouian <rod.oskouian@gmail.com>	Arthur Harrigan <harrigan@seanet.com>	Dave Sabey <DaveS@sabey.com>; Johnny Delashaw <jdelashawjr@gmail.com>; Tyler Farmer <tylerf@harriganleyh.com>; robertgust@me.com
13	556955	11/18/2017 7:47 PM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Dave Sabey <DaveS@sabey.com>	Arthur Harrigan <harrigan@seanet.com>	Johnny Delashaw <jdelashawjr@gmail.com>; Tyler Farmer <tylerf@harriganleyh.com>; rod.oskouian@gmail.com; robertgust@me.com
14	555109	11/18/2017 7:50 PM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Johnny Delashaw <jdelashawjr@gmail.com>	Dave Sabey <DaveS@sabey.com>	Arthur Harrigan <harrigan@seanet.com>; Tyler Farmer <tylerf@harriganleyh.com>; rod.oskouian@gmail.com; robertgust@me.com
15	539660	11/18/2017 9:53 PM	X		Email and attachments containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles.		Johnny Delashaw <jdelashawjr@gmail.com>	Arthur Harrigan <harrigan@seanet.com>; tylerf@harriganleyh.com; Robert Gust <robertgust@me.com>; Rod J. Oskouian Jr. <rod.oskouian@gmail.com>; Dave Sabey <DaveS@sabey.com>; Tyler Farmer <tylerf@harriganleyh.com>	
	539662	11/18/2017 9:53 PM	X		attachment to doc ID 539660	Cosentino, Andy			
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16	539977	11/19/2017 8:08 AM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Rod Oskouian <rod.oskouian@gmail.com>	Dave Sabey <DaveS@sabey.com>	Johnny Delashaw <jdelashawjr@gmail.com>; Arthur Harrigan <harrigan@seanet.com>; tylerf@harriganleyh.com; Robert Gust <robertgust@me.com>; Tyler Farmer <tylerf@harriganleyh.com>
17	538867	11/19/2017 12:25 PM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles.		Rod Oskouian <rod.oskouian@gmail.com>	Johnny Delashaw <jdelashawjr@gmail.com>	Tyler Farmer <tylerf@harriganleyh.com>; robertgust@me.com; Dave Sabey <daves@sabey.com>; Arthur Harrigan <harrigan@seanet.com>

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19	543581	11/30/2017 5:03 PM	X	X	Email and attachment containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Rod Oskouian <rod.oskouian@gmail.com>	vickyc@harriganleyh.com; tylerf@harriganleyh.com; KateN@harriganleyh.com; Johnny Delashaw <jdelashawjr@gmail.com>; DaveS@sabey.com; Arthur Harrigan <harrigan@seanet.com>; robertgust@mac.com; John Layman <JRLayman@laymanlawfirm.com>	
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20	544349	11/30/2017 6:47 PM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and/or related government investigations.		Johnny Delashaw <jdelashawjr@gmail.com>	Dave Sabey <DaveS@sabey.com>; Arthur Harrigan <harrigan@seanet.com>; Tyler Farmer <tylerf@harriganleyh.com>	
21	543886	12/1/2017 4:36 AM	X	X	Email and attachment containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles.		Rod Oskouian <rod.oskouian@gmail.com>	vickyc@harriganleyh.com; tylerf@harriganleyh.com; KateN@harriganleyh.com; Johnny Delashaw <jdelashawjr@gmail.com>; DaveS@sabey.com; Arthur Harrigan <harrigan@seanet.com>; Robert Gust <robertgust@me.com>; John Layman <JRLayman@laymanlawfirm.com>	
	543887	12/1/2017 4:36	X		attachment to doc ID 543886	Brown, Sarah [HSI]			
22	544309	12/4/2017 11:16 AM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Johnny Delashaw <jdelashawjr@gmail.com>	Rod Oskouian <rod.oskouian@gmail.com>	Dave Sabey <DaveS@sabey.com>; Robert Gust <robertgust@me.com>; Tyler Farmer <tylerf@harriganleyh.com>; Arthur Harrigan <harrigan@seanet.com>
23	545194	12/4/2017 3:48 PM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Rod Oskouian <rod.oskouian@gmail.com>	Johnny Delashaw <jdelashawjr@gmail.com>	Dave Sabey <DaveS@sabey.com>; Robert Gust <robertgust@me.com>; Tyler Farmer <tylerf@harriganleyh.com>; Arthur Harrigan <harrigan@seanet.com>
24	551689	12/8/2017 8:28 AM	X	X	Email and attachment containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles.		Robert Gust <robertgust@me.com>	Johnny Delashaw <jdelashawjr@gmail.com>	
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25	552601	12/15/2017 10:09 AM		X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and related government investigations.		Rod Oskouian <rod.oskouian@gmail.com>	Johnny Delashaw <jdelashawjr@gmail.com>; Amy Magnano <amagnano@bblaw.com>	
26	554591	12/15/2017 10:23 AM		X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and related government investigations.		Rod Oskouian <rod.oskouian@gmail.com>	Amy Magnano <amagnano@bblaw.com>; Johnny Delashaw <jdelashawjr@gmail.com>	

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28	539818	12/17/2017 12:04 PM		X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Rod Oskouian <rod.oskouian@gmail.com>	Amy M. Magnano <AMagnano@bblaw.com>	Johnny Delashaw <jdelashawjr@gmail.com>
29	539348	12/17/2017 12:05 PM		X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and/or related government investigations.		Rod Oskouian <rod.oskouian@gmail.com>	Johnny Delashaw <jdelashawjr@gmail.com>	
30	540853	12/17/2017 12:08 PM		X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Rod Oskouian <rod.oskouian@gmail.com>	Amy M. Magnano <AMagnano@bblaw.com>	Johnny Delashaw <jdelashawjr@gmail.com>
31	541626	12/22/2017 9:41 AM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Johnny Delashaw <jdelashawjr@gmail.com>	Tyler Farmer <tylerf@harriganleyh.com>	Arthur Harrigan <harrigan@seanet.com>; Dave Sabey <DaveS@sabey.com>
32	544986	12/25/2017 12:02 PM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles.		Johnny Delashaw <jdelashawjr@gmail.com>	Tyler Farmer <tylerf@harriganleyh.com>; Dave Sabey <daves@sabey.com>; Arthur Harrigan <harrigan@seanet.com>	
33	545424	12/25/2017 1:09 PM		X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Rod Oskouian <rod.oskouian@gmail.com>	Johnny Delashaw <jdelashawjr@gmail.com>	Amy Magnano <amagnano@bblaw.com>
34	548451	1/11/2018 8:49 AM	X	X	Email containing client confidential information reflecting legal advice and/or legal advice regarding ongoing issues pertaining to Cobbs et al. conspiracy and Seattle Times articles and related government investigations.		Johnny Delashaw <jdelashawjr@gmail.com>	Dave Sabey <DaveS@sabey.com>; Arthur Harrigan <harrigan@seanet.com>; Tyler Farmer <tylerf@harriganleyh.com>	